LEWIS QUENTIN GARVER

IBLA 82-606 Decided September 16, 1982

Appeal from decision of Nevada State Office, Bureau of Land Management, rejecting petition/application for Indian allotment. N 32871.

Affirmed.

1. Act of September 26, 1961 -- Applications and Entries: Generally -- Indian Allotments on Public Domain: Classification -- Indian Allotments on Public Domain: Lands Subject to

   Where Congress has withdrawn lands for use of the Air Force, and thereby segregated them from all forms of disposal under the public land laws, the lands are "otherwise appropriated" within the meaning of sec. 4 of the General Allotment Act and are not available for Indian allotment.

2. Act of September 26, 1961 -- Applications and Entries: Generally -- Indian Allotments on Public Domain: Classification -- Indian Allotments on Public Domain: Lands Subject to

   The Secretary is without authority to classify lands withdrawn for Nellis Air Force Base by Congress in the Act of September 26, 1961, as suitable for Indian allotments under sec. 4 of the General Allotment Act.

APPEARANCES: Carole R. Whitaker, mother of appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Appeal has been taken on behalf of Lewis Quentin Garver, a minor, from the Nevada State Office, Bureau of Land Management (BLM), decision of January 18, 1982, which rejected his Indian allotment application N 32871 filed under section 4 of the General Allotment Act of 1887, 25 U.S.C. §§ 334, 336 (1976), because the land sought in SE 1/4 sec. 36, T. 16 S., R. 57 E., Mount Diablo meridian, Clark County, Nevada, is within the military withdrawal established by P.L. 87-310, Act of September 26, 1961, for the Nellis Air Force Base.

Appellant states:

> The classification, rejection and scope and effect of the decision is based upon powers derived from the Statutes, in particular 43 USC 415f, (Section 7, of the Taylor Grazing Act.) 1/ 43 USC 415f, is used as a facade by the Department of Interior to sterilize claims to allotments and in particular is used as a facade to sterilize the provisions of 25 US Code Sections 332, 334 and 415. Indian allotment claims taken on the public domain are taken with the same restrictions and in the same manner as for Indians residing upon reservations (25 US Code 334) and the use Indian allotments can be used for is contained in 25 US Code Section 415. 25 US Code 415 should be read in light of U.S. Constitutional Amendment Five and the doctrine of Choate vs. Trapp 224 U.S. 665, 32 S. Ct. 565, 56 L, Ed. 941.
>
> I intend to pursue my claim under 25 years Claim No. 345-346. This decision contravenes U.S. Constitutional Amendment Five and the doctrine set forth in Choate vs. Trapp, decided in 1912 which provides rights of Indians under U.S.C.A. Constitutional Amendment Five.

In Mary Frances Stiles, 64 IBLA 361 (1982), the Board held that where an Indian allotment application is accompanied by a petition for classification of the land as suitable for disposition under the General Allotment Act, it is incorrect for BLM to reject the allotment application without first ruling on the petition for classification.

[1, 2] However, where the land sought for allotment has been segregated from all forms of disposal under the public land laws, pursuant to an Act of Congress, action on the petition for classification would be a futile exercise.

An application for Indian allotment is properly rejected when filed for land not available for settlement and disposition under the General Allotment Act when the application is filed. Lula Lorene McCracken Slowey, 58 IBLA 202 (1981); Thurman Banks, 22 IBLA 205 (1975). Accordingly, BLM properly rejected this application because the land has not been restored or opened to application.

1/ The correct citation for section 7, Taylor Grazing Act, is 43 U.S.C. § 315(f) (1976).

Appellant suggests the rejection of his application is a violation of the fifth amendment, being a deprivation of property without due process of law. Contrary to appellant's belief, the mere filing of an application or the receipt of a certificate showing an Indian to be eligible to receive an allotment under section 4 of the General Allotment Act does not create a present right in the lands applied for by the individual Indian, but only a right to have the application considered. Finch v. United States, 387 F.2d 13 (10th Cir. 1967), cert. denied, 390 U.S. 1012 (1968); Clark v. Benally (On Rehearing), 51 L.D. 98 (1925); accord, John R. Bowen, A-28326 (July 11, 1960); Miles W. Payne, A-28030 (Aug. 17, 1959). Moreover, section 4 of the General Allotment Act permits allotments only on unappropriated public domain lands outside of Indian reservations and, therefore, does not confer upon an Indian a vested right to an allotment. Cf. Martha Head, 48 L.D. 567 (1922).

Appellant's right to due process is protected by this appeal, and he may reapply for reclassification of any lands that the Department has authority to classify as suitable for disposition under the General Allotment Act, and that is not "otherwise appropriated." Marjorie N. Underwood, 58 IBLA 21 (1981); Curtis D. Peters, 13 IBLA 4 (1973).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Douglas E. Henriques
Administrative Judge

We concur:

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Will A. Irwin
Administrative Judge

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C. Randall Grant, Jr.
Administrative Judge